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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-5554

DELBERT L. SHORTER,

Petitioner,

vs.

PHILLIP R. THIEME, Judge, Misdemeanor Division, Allen Superior Court

BARRIE C. TREMPER, Public Defender, Allen County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO INDIANA COURT OF APPEALS, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, Third District, is reported in 292 N.E. 2d 286.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether an indigent's right "to have the assistance of counsel" under the Sixth Article of Amendment of the Constitution of the United States entitles him to counsel of his own choosing at public expense.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Articles of Amendment, XIV, §1; VI) are set forth in the petition at page 2.

STATEMENT OF THE CASE

The petitioners, Delbert L. Shorter, was convicted of contributing to the delinquency of a minor. At his trial he was represented by Robert S. McCain as his attorney. Following the overruling of Shorter's motion to correct errors, he filed a petition as an indigent for costs of transcript, bill of particulars, and attorney's fees for his trial counsel to prosecute an appeal to the Court of Appeals of Indiana. The trial court found Petitioner to be temporarily indigent, allowed him the cost of a transcript and bill of particulars, and attorney's fees, but assigned the appeal to the office of the public defender of Allen County.

Petitioner then filed a petition in the Court of Appeals of Indiana for a writ of prohibition to forbid the Respondents, Allen Superior Court and the Honorable Phillip R. Thieme, Judge of the Misdemeanor Division of that Court, from assigning his appeal to a court appointed public defender and from preventing his trial attorney from representing him in his appeal with compensation to be provided from the county treasury for his service.

The Court of Appeals of Indiana denied Petitioner's petition for a writ of prohibition. Petitioner then filed petition for rehearing, which was overruled. He then filed a petition in the Supreme Court of Indiana to transfer the cause from the Court of Appeals to the Supreme Court, which petition the Supreme Court of Indiana denied.

Petitioner seeks a writ of certiorari to review the action of the Court of Appeals of Indiana.

SUMMARY OF ARGUMENT

The action of the respondent court and the decision of the Court of Appeals are not in excess of jurisdiction of said courts and the petitioner is not without an adequate remedy because:

1. The trial court had jurisdiction to appoint counsel for Petitioner as an indigent defendant, and a writ of prohibition did not lie to prohibit it from exercising such jurisdiction.

2. The trial court did not remove Petitioner's trial counsel.

3. Petitioner's counsel could have had the appeal assigned to him by the county public defender, but did not request such assignment.

4. An indigent is entitled to counsel for an appeal but not necessarily the counsel of his choice.

5. Petitioner's remedy lay in an interlocutory appeal from the court's order assigning his appeal to the county public defender and failing to order attorney's fees paid to his trial counsel for the appeal.

ARGUMENT

I.

THE ACT OF THE RESPONDENT COURT AND THE DECISION OF THE COURT OF APPEALS ARE NOT IN EXCESS OF THE JURISDICTION OF SAID COURTS AND THE PETITIONER IS NOT WITHOUT AN ADEQUATE REMEDY.

The Petitioner invoked action by the trial court by filing a petition alleging indigency and asking the court to allow him at public expense the cost of a transcript for appeal, bill of exceptions, and attorneys' fees. The trial court granted the request for the cost of a transcript and bill of exceptions, but met the request for allowance of attorneys' fees by assigning the public defender of Allen County to perfect and prosecute the Petitioner's appeal.

Although Petitioner quotes the requirement of *Rule* CR 11(3), *Indiana Rules of Procedure* that its court advise a defendant after sentencing that

> "if he is financially unable to employ an attorney, the court will appoint counsel for defendant at public expense for the purpose of filing the motion to correct errors and for taking an appeal."

he argues that "The respondent court had no authority to substitute counsel who had assisted in petitioner's defense at trial for counsel which the court arbitrarily chose to assign." Yet he cites no authority for his position. *Grecco v. Allen Circuit Court* (1958), 238 Md. 571, 153 N.E. 2d 914, cited by Petitioner, sheds no light on the question as it is a case in which the trial counsel refused to represent the defendant on appeal because of defendant's lack

of funds to pay him and the trial court denied the defendant's petition for appointment of pauper counsel. *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, is even less in point as it concerned the refusal of the trial court to provide indigent defendants a stenographic transcript of the proceedings.

Certainly, the duty to advise an indigent defendant that the court will appoint counsel for him is meaningless unless the court has jurisdiction to appoint such counsel. If the court had such jurisdiction, it logically follows that a writ of prohibition did not lie to prohibit the court from exercising it.

Defendant argues that the duties of the public defender do not include handling appeals where the trial court still has jurisdiction to appoint another attorney and cites *Lawson v. State* (1954), 233 Ind. 509, 121 N.E. 2d 721. That case refers to the Public Defender of the State, appointed by the Indiana Supreme Court, and not to public defender's of counties, appointed by trial courts. Even if handling appeals is not included in the duties of local public defenders, such fact would not make them ineligible for appointment as pauper counsel for such purpose. At most, such fact would only be grounds for such public defenders to refuse such appointment.

Neither is it true, as argued by Petitioner that the action of the trial court "was an act of removal, not appointment of counsel." The court did not remove defendant's privately-employed counsel. It merely refused to pay him out of the public treasury. On page 17 of the bill of exceptions containing the evidence given at the hearing on Petitioner's petition in the trial court the following between the trial court and Thomas L. Ryan, partner of Petitioner's attorney appears:

"COURT: Okay, your motion, or you petition is granted.

"MR. RYAN: Well, now for clarification, it is granted in what respect?

"COURT: Well, in this one, in all three, the Transcript, of course, and Bills of Exception, we're in doubt. So, the attorney fee to prosecute the appeal. The only way I know to put that would be, cause assigned to Public Defender for appeal and have the case assigned to you. But, anyway, that's the procedure they want us to follow."

This colloquy indicates that the Court had no objection to Petitioner's attorney's handling the appeal, but it would have to be by assignment by the Public Defender. The record does not indicate the Petitioner's attorney ever requested the Public Defender to assign the case to him.

On page 33 of the same bill of exceptions appears the following statement by the trial court to Mr. McCain, Petitioner's attorney:

"• • • Now, the Court rule is that if a Defendant wishes to have the services of a public defender, for an appeal, and if he qualifies for those services, he then is referred to the public defender's office for an attorney to be selected by the Public Defender, Mr. Tremper, to perfect his appeal. And it's at that stage, that we are presently."

From the above it appears that the Petitioner's attorney might have been appointed to perfect the appeal if Petitioner had so requested the Public Defender.

Macon v. Orange Circuit Court (1962), 243 Ind. 429, 185 N.E. 2d 619, 620, cited by counsel as authority for his right to have his trial counsel appointed as pauper attorney to perfect his appeal is a case in which the Indi-

ana Supreme Court upheld the refusal of pauper counsel who represented the defendant in his trial to file a motion for a new trial because:

> "• • • No one is better able to determine whether error has occurred which would be grounds for a new trial than such trial counsel. • • •
>
> "We must therefore assume that competent counsel assigned for trial would have filed a motion for a new trial if meritorious grounds therefor had existed, since such was his duty.
>
> "• • • we cannot assume without a showing that a motion for a new trial should have been filed or that counsel was incompetent because such a motion was not filed."

Petitioner states, "And, respondent ordered the fees and costs for Shorter's appeal. The respondent's duty did not call for more." This ignores the fact that Petitioner also asked the Court to allow attorney's fees from the county treasury. The trial court did not remove Shorter's attorney of record, as charged by Petitioner and "capriciously" order the appeal to another attorney. Shorter's attorney was still free to prosecute the appeal if employed by Shorter to do so, but he could not be paid from the county treasury unless the public defender of the county assigned the appeal to him.

Petitioner cites Indiana Code 1971, 35-7-2-2 [Burns' Stat., §9-2211] as a statutory grant to defendants accused of violating probation of the right to "counsel of his choice." It is to be noted, however, the section of statute does not say "counsel of his choice at public expense."

Swenson v. Bosler (1967), 386 U.S. 258, 260, 18 L. Ed. 2d 33, 36, cited by Petitioner did hold that an indigent was

entitled to appellate counsel, but did not hold that he was entitled to counsel of his choice at public expense.

While an indigent has an absolute right to the assistance of counsel, he does not have the absolute right to the counsel of his choice. *United States v. Hampton* (7th Cir. 1972), 457 Fed. 2d 299; *Reiff v. United States* (9th Cir. 1962), 299 Fed. 2d 366, cert. den. (1963) 372 U.S. 937, 83 S. Ct. 884, 9 L. Ed. 2d 768; *State v. Irvin* (1973), —— Ind. ——, 291 N.E. 2d 70, and cases cited.

It has been held that, when a defendant is financially unable to employ an attorney, it is the duty of the court to appoint a competent attorney to represent him. *Fitzgerald v. State* (1970), 254 Ind. 39, 257 N.E. 2d 305; *State v. Minton* (1955), 234 Ind. 578, 130 N.E. 2d 226. As to what constitutes a competent attorney is, of course, dependent upon the facts of the particular case. It is conceivable that the trial court had reason to feel it would be doing the defendant a disservice by committing the appeal of his case to the attorney who had just lost it in the trial. The trial court, undoubtedly knew the attorneys of its bar and may have considered the public defender more competent to handle the appeal.

There is much to be said for the practice of assigning all appeals for indigents to the local public defender, when there is one. To begin with the public defender acquires experience in excess of that obtained by many attorneys who only occasionally have a criminal appeal—perhaps only once in a lifetime. Also, a court may more readily obtain a competent public defender if it gives him all the indigent criminal appeals in the court, than if other attorneys receive some of these fees.

It appears from what record is available that it was the rule in the trial court to assign indigent criminal

appeals to the public defender of the court who would then select an attorney to handle the appeal. The Court suggested that petitioner's trial attorney could have the appeal assigned to him by the public defender on request. (Bill of Exceptions Containing Evidence Given at Hearing on Petition, pp. 17, 33.) It no where appears that Petitioner's trial attorney approached the public defender with such a request.

Upon the authority of *State v. Irvin* (1973), —— Ind. ——, 291 N.E. 2d 70, the respondent court held:

> "Since the matter of whom the Court will appoint as pauper counsel for an indigent defendant is solely within the trial court's discretion, a writ of prohibition, which lies to confine a trial court to its lawful jurisdiction, will not issue.,
>
> "Shorter has no absolute right to the relief requested. Any question concerning the wisdom or propriety of the trial court's action is a subject for review on appeal, not in proceedings for an extraordinary writ. State ex rel. Gibson General Hospital v. Warrick Circuit Court (1966), 247 Ind. 240, 214 N.E. 2d 655; State ex rel. Beverly Shores Hotel Corp. v. Fleishbein (1953), 232 Ind. 549, 114 N.E. 2d 642." *State ex rel. Shorter v. Allen Superior Court* (1973), —— Ind. App. ——; 292 N.E. 2d 286.

Petitioner claims that he cannot pursue his remedy of appeal because the error asserted makes the county public defender an adversary rather than his advocate. The assignment of Petitioner's appeal from his conviction to the county public defender did not discharge Petitioner's attorney but only denied him compensation from the county treasury unless the county public defender should assign the appeal to him. That Petitioner's attorney represented him in his petition for a writ of prohibition,

petition for rehearing, petition for transfer, and the instant petition for a writ of certiorari would indicate that such attorney could also have represented him in an interlocutory appeal from the action of the trial court in assigning his appeal to the county public defender and failing to order attorney's fees paid to Petitioner's attorney.

[NOTE: The petition contains numerous references to purported pages of record but the State has been unable to locate such a record. Although Petitioner praeciped for a record of the proceedings in the Indiana Court of Appeals, the record of said court indicates no compliance with such praecipe. Pages of the record of the respondent court do not correspond to pages of the record attached to his petition for a writ of prohibition. The transcript of his trial has not been filed with the Indiana Court of Appeals, but he has filed five successive petitions to file said transcript, four of which have been granted and one is pending for ruling.]

CONCLUSION

For the foregoing reasons it is respectfully submitted this petition for a writ of certiorari should be denied.

Respectfully submitted,

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